No. 10-595

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IN THE

Supreme Court of the United States

FRANCIS A. ZARRO, JR.,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioner respectfully requests that this Court grant rehearing of its order dated December 10, 2010, which denied certiorari, and that the Court now grant certiorari and reverse the judgment and remand for a hearing on subject matter jurisdiction and the unconstitutionality of New York Executive Law 63(3), the supercedure statute upon which the case at bar was prosecuted for vagueness.

The petition for certiorari previously filed herein presented the questions: (1) Does a criminal defendant involuntarily waive or forfeit his Sixth Amendment right to conflict free counsel on, the basis of writing a letter to his lawyer on the eve of trial which the trial court subsequently describes as expressing defendant's concerns that more time is needed to prepare for trial? (2) Does counsel's violation of the Advocate Witness Rule by unilaterally testifying as an unsworn witness against his client on a material issue in the case on the record of proceedings to the Judge in a bench trial, on the opening day of trial immediately prior to opening statements, where Defendant has not taken the stand or committed perjury, violate Defendant's Sixth Amendment right to effective assistance of counsel and further deprive Defendant of fair trial before an unbiased trier of fact? The petition for certiorari discussed the importance of the questions presented in this case and its impact upon the administration of justice especially concerning the issue of forfeiture of a criminal defendant's Sixth Amendment right to counsel, and the necessity for the Court to

define what "serious defendant misconduct" could give rise to such a forfeiture.

This motion is based upon substantial grounds not previously presented, to wit that the Court should enter an order based upon the uncontroverted record in the State Courts and that the trial court lacked subject matter jurisdiction and denied Petitioner's federal due process rights by deciding jurisdiction on an incomplete record without a hearing. *Frank v. Mangum,* 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); *Ex Parte Cuddy,* 131 U.S. 280, 9 S.Ct. 703, 33 L.Ed. 154 (1889); *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *Danforth v. Minnesota,* 128 S.Ct. 1029 (2008) and the unconstitutional New York Executive Law 63(3) upon which the trial court based subject manner jurisdiction.

ABSENCE OF SUBJECT MATTER JURISDICTION IN THE TRIAL COURT

Unless otherwise provided by statute, the New York Attorney General does not have authority to prosecute crimes in the State's Sixty-two Counties. By virtue of State Constitutional and Statutory authority this power rests solely with the duly elected District Attorneys who are elected to investigate and prosecute crimes which occur in the Counties which they represent. *People v. Gilmour,* 98 N.Y.2d 126, 746 N.Y.S.2d 114, 773 N.E.2d 479 (Ct. App. 2002); *Della Pietra v. State of New York,* 71 N.Y.2d 792, 530 N.Y.S.2d 510, 526 N.E.2d 1 (Ct. App. 1988); *People v. Romero,* 91 N.Y.2d 750, 675 N.Y.S.2d 588, 698 N.E.2d 424 (Ct.

App. 1998); *People v. Fox*, 253 A.D.2d 192, 692 N.Y.S.2d 174 (A.D. 3 Dept. 1999).

In October 2002, Petitioner moved to controvert the search warrants in this case by motion to suppress and specifically challenged the Attorney General's authority to obtain and execute the warrants [Appendix C]. The Attorney General responded by providing the trial court with a copy of a purported referral letter dated March 27, 2001 from Elizabeth McCaul, New York State Banking Department Superintendent at the time, pursuant to Executive Law § 63(3).

Petitioner's counsel Benedict Gullo characterized the letter as a "sham", stating that the Banking Department itself had no jurisdiction over Petitioner, and that the Banking Department had never received a complaint against or conducted an antecedent agency investigation of Petitioner which would lead to such a referral letter as required by state statute. The motion was denied without a hearing. Petitioner addressed the same grounds in a branch of an April 2003 omnibus motion, also denied without a hearing on January 5, 2004.

Petitioner challenged the Attorney General's authority again in a December 2005 post-conviction motion, during the course of which the Attorney General admitted to issuing pre-March 27, 2001 (January 1999) subpoenas in the case relating to the indictment, but then attempted to justify the 1999 subpoenas by changing its basis of authority from the March 27, 2001 referral letter to an unrelated December 30, 1997 referral letter concerning a William Zuga, who had nothing to do with Petitioner, and who Petitioner does not

know, and has had no dealings with. The Attorney General told the trial court in a March 23, 2006 letter in the CPL § 440 proceeding, that although the December 30, 1997 letter did not name Petitioner, it was based on a "joint" Banking Department complaint against and investigation of Petitioner and a person named William Zuga.

Petitioner's counsel demanded to see the joint complaint, but the Attorney General refused, and on December 31, 2006, the trial court denied the CPL § 440 motion without a hearing.

Petitioner thereafter sought and obtained through State FOIL and the use of private investigators, evidence in the form of official state documents, and attorney and licensed private investigator affidavits evidencing that the New York Attorney General did not have authority to investigate and prosecute Petitioner and that the Trial Court thusly never obtained subject matter jurisdiction.

On December 12, 2008, Petitioner applied for subpoenas in the criminal case for present and former Banking Department officials and records. The Attorney General opposed and the application was denied.

On December 9, 2008; May 18, 2009 and October 2, 2009, the New York State Banking Department certified to Petitioner that it never received a complaint against or conducted an investigation of Petitioner, and that the New York State Banking Department has no official record of any complaint against or investigation of Petitioner, or Executive Law 63(3) referral letter concerning Petitioner, or record or log of any such record being destroyed or disposed of, disclosable or non-disclosable.

On November 13, 2008, the New York Attorney General disclosed that the December 30, 1997, so-called "Zuga" referral which it had represented was a further source of authority to investigate Petitioner, was not based upon a joint Banking Department complaint and investigation of Petitioner and Zuga, but, only Zuga.

On July 24, 2008, the New York State Police disclosed that the Attorney General began its investigation of Petitioner on June 10, 1997, before any purported referral letter came into existence.

The New York State Archives, the only official State facility designated for the maintenance of Banking Department records of complaints, investigations and Executive Law § 63(3) referral letters, such as concern this Petition, has no record of any Banking Department complaint, investigation or referral letter concerning Petitioner.

Former New York State Banking Department Superintendent Elizabeth McCaul stated to investigators that she could not verify the signature on the March 27, 2001 letter as her own; did not recall Petitioner's case; and would not authenticate the March 27, 2001 letter and continues to refuse to say if the signature on the letter is her own.

Petitioner's private investigator stated after a preliminary comparative analysis that the signature on the March 27, 2001 letter does not appear to be Ms. McCaul's, and the Attorney General did not at any time produce an affidavit from Ms. McCaul that she signed the March 27, 2001 letter and continues to refuse to produce such an affidavit.

The CPL § 440 court denied the motion on October 27, 2009, but, granted limited hearing on suppression of pre-referral evidence, which it subsequently cancelled on cross motion by the Attorney General. The Appellate Division, Second Judicial Department, denied each of Petitioner's motions for certificate of leave to appeal the trial court's denial of the CPL § 440 motions. The Appellate Division Second Department denied Petitioner's motion to enlarge the record on appeal to include these documents on the original record on direct appeal, and denied inter alia, the jurisdiction claims branch of Petitioner's direct appeal on the same day October 27, 2009, when it affirmed Petitioner's conviction. The New York Court of Appeals denied leave on May 5, 2010 *People v. Zarro,* 14 N.Y.3d 894. A motion to re-argue was filed on May 24, 2010, and supplemental filing on June 14, 2010, and was denied again on August 6, 2010 *People v. Zarro,* 15 N.Y.3d 811.

Petitioner was deprived of his Fourteenth Amendment right to be tried by a court of competent jurisdiction, and the trial court on pretrial suppression and omnibus motions and post-conviction motions without a hearing; and the Appellate Division, Second Judicial Department, in its October 27, 2009 affirmance, and the New York Court of Appeals, in its May 5, 2010 and August 6, 2010 denials of leave to appeal, based their decisions that the Attorney General had jurisdiction and authority in this case on an incomplete record on appeal, and refused to conduct any hearings, and thereby denied Petitioner his right to due process of law as decided by the Supreme Court of the United States in *Ex parte Cuddy,* 131 U.S. 280,

9 S.Ct. 703, 33 L.Ed. 154 (1889); *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Danforth v. Minnesota*, supra, existing at time of Petitioner's case, concerning the violation of Petitioner's Fourteenth Amendment right to be tried by a court of competent jurisdiction and to a hearing to fully and fairly litigate whether or not the court had subject matter jurisdiction. This is a federal due process question not a mere interpretation of a New York supercedure statute. The State courts have refused to evaluate and test evidence at a hearing, proving that the provisions of Executive Law § 63(3) were not complied with thereby depriving the trial court of subject matter jurisdiction. A hearing on this petition was essential to establish this evidence on the record.

Under New York Law, the burden of proof is on the Attorney General to establish jurisdiction on the basis of Executive Law § 63(3) *People v. Gilmour*, supra.

The presumption is that a court of general jurisdiction proceeded to judgment only after duly acquiring jurisdiction both of the subject matter and the parties, and that it acted in accordance with the rules of practice governing it, and did not act until every prerequisite required by the law had been complied with *Williams v. State of North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945); *Steinhardt v. Baker*, 163 N.Y. 410, 57 N.E. 629 (N.Y. June 12, 1900); *Smith v. Central Trust Co.*, 154 N.Y. 333, 48 N.E. 553 (N.Y. Nov. 23, 1897).

This presumption is not allowed to contradict the record and can arise only with respect to jurisdictional facts concerning which the record discloses nothing and concerning which no evidence is offered *Ex parte Cuddy*, supra, *Frank v. Mangum*, supra.

"When it affirmatively appears that any essential step was omitted, the Presumption in favor of jurisdiction is destroyed. It should be noted that no such presumption exists with respect to inferior courts of limited jurisdiction. *Smith v. Central Trust*, supra, Cf *People v. Pugliese*, 80 Misc. 75, 140 N.Y.S. 849 (N.Y.Sup. Mar. 26, 1913), *affd* 164 A.D. 900, 148 N.Y.S. 1135 (N.Y.A.D. 2 Dept., July 31, 1914). See also Federal Rule of Civil Procedure 8(a)(1) which requires that pleadings allege the basis for jurisdiction".

The language of New York Executive Law § 63(3) is unconstitutionally vague as to whether or not the Attorney General of New York may trigger his own latent criminal prosecutorial powers by soliciting or self referring his own Executive Law § 63(3) referral letter. Not only is the statute unconstitutionally vague, but the leading New York Court of Appeals cases are silent in this point even though the legislative history of the statute clearly and logically indicates that the latent prosecutorial powers of the New York Attorney General may only be invoked by the head of a department of State Government on the basis of an antecedent departmental investigation of a subject on matters related, to the department's statutory purpose. At bar, New York Attorney General has admitted on the record that he solicits these letters as a matter of practice.

An examination by the Supreme Court of New York Executive Law § 63(3) for unconstitutional vagueness is not only of critical importance for disposition of this Petition, but, has significant national importance as well.

New York is the Nation's financial hub and the New York Attorney General has of late sought to expand its regulatory and procedural roles in addressing financial regulatory activities around the Nation and the world *Cuomo v. Clearing House Association L.L.C.*, ___ U.S. ___, 129 S.Ct. 2710, 174 L.Ed.2d 464 (2009).

The Office of the New York Attorney General is unique as state prosecutors go in that he has been divested by state statute and state constitutional provisions of all non-securities criminal prosecutorial functions, save for those specifically granted by his strict compliance with Executive Law § 63. *People v. Gilmour*, 98 N.Y.2d 126, 746 N.Y.S.2d 114, 773 N.E.2d 479 (Ct. App. 2002).

Failing strict compliance, the New York Attorney General is "not a prosecutor at all". *Della Pietra v. State of New York*, 71 N.Y.2d 792, 530 N.Y.S.2d 510, 526 N.E.2d 1 (Ct. App. 1988).

The New York State Constitution and New York State Legislature have attempted ot circumscribe the Attorney General's powers, and yet, Executive Law § 63(3) is vague enough to have allowed the New York Attorney General to assume penultimate prosecutorial authority over financial matters without interference by the state courts. This is especially troublesome in the current economic environment where small businesses and entrepreneurs, such as Petitioner who are the

least able to contend with the vast resources of the state, are left vulnerable to selective punitive and politically motivated prosecutions.

On the issue of self created referrals or solicited referrals, Executive Law § 63(3) and the New York courts are vague, and the New York Attorney General has filled the vacuum and overstepped his jurisdictional bounds in this case and others. In *People v. Codina*, 297 A.D.2d 539, 541, 747 N.Y.S.2d 209, 211 (A.D. 1 Dept. 2002), the Appellate Division, First Judicial Department specifically held "we reject self referrals" and yet, at bar, the Attorney General has admitted on the record "we solicit referrals all the time" and has tried to say that a "solicited" referral is different from a "self created referral".

The New York Court of Appeals has never issued a ruling on whether or not "self created" or "solicited" referrals could properly invoke the Attorney General's latent prosecutorial powers.

The New York courts have never fully and fairly litigated the Executive Law § 63(3) issue in this case, and have refused to conduct a single hearing in the face of Banking Department certifications and affidavits from private investigators, decisively rebutting any presumption that the purported March 27, 2001 referral letter was authentic, and conclusively establishing that the Banking Department has no official record of having ever received a complaint against; conducted and investigation of or issued a valid Executive Law § 63(3) referral letter pertaining to Petitioner.

In a recent appeal concerning Petitioner's Second amended complaint in a 42 U.S.C. § 1983 action, issued and served with the prior approval and by order of the District Court in response to the mandate of the United States Court of Appeals for the Second Circuit, in *Zarro v. Spitzer,* 274 Fed. Appx. 31, 35 [5] (2nd Cir. 2008), the Circuit authorized Petitioner to proceed with his 42 U.S.C. § 1983 malicious Prosecution and Abuse of Process claims against State actors and non-State actors, and in specific Appellant's claims that he was arrested and prosecuted by the State actors without proper statutory authority or jurisdiction. Petitioner did not include the jurisdiction grounds in the initial Petition to the Supreme Court because a decision on the appeal pending in the Second Circuit, and a parallel motion to certify state law question to the New York Court of Appeals was pending at the time Petitioner transmitted the Petition to the printer for filing. The Second Circuit affirmed the dismissal of the action by the United States District Court for the Northern District of New York, on immunity and jurisdiction grounds on October 18, 2010, holding that prior state court decisions were preclusive on jurisdiction and thusly, immunity. *Francis A. Zarro, Jr. v. Eliot Spitzer, et al.,* 09-4349-CV (2nd Cir. 2010). The Second Circuit's October 18, 2010 decision is the "intervening factor" which gives rise to the instant Petition.

Petitioner moved the Second Circuit to certify the Executive Law § 63(3) issues concerning authority and jurisdiction, to the New York Court of Appeals, as part of Petitioner's appeal to the Second Circuit, in the 42 U.S.C. § 1983 action. The

motion was denied. The certification questions presented were not only appropriate but essential to deciding the appeal, which was based primarily on defenses of prosecutorial immunity, which defense would be defeated upon a showing of absence of jurisdiction and authority. The New York courts have avoided these questions because they very likely expose long standing prosecutorial practices by the Attorney General of New York which are ultra vires.

As to the due process of law that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state must be before a court of competent jurisdiction. The Supreme Court may vacate a state court criminal conviction either because [as at bar], such jurisdiction was absent at the beginning or because it was lost in the course of proceedings *Frank v. Mangum,* supra; *Ex parte Cuddy*, supra; *Lonchar v. Thomas,* 517 U.S. 314, 322, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996); *Danforth v. Minnesota,* supra.

Petitioner respectfully requests that the Supreme Court review the application and constitutionality of New York Executive Law 63(3); reverse the judgment and remand the case to the state courts for a full and fair hearing on violations of Petitioner's Fourteenth Amendment due process right to be tried by a court of competent jurisdiction, based upon this unconstitutionally vague supercedure statute, and the ultra vires actions of the New York Attorney General in this case.

The undisputed record in this case, annexed; this Court's prior decisions on the right of a crim-

inal defendant and the vagueness of NY Executive Law 63(3) merit that certiorari be granted and that reversal of the judgment of conviction be ordered.

Respectfully submitted,

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CERTIFICATE

I certify that this petition is presented in good faith and not for purposes of delay.

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CERTIFICATION PURSUANT TO RULE 29.4(c)

Petitioner certifies and provides notification as required by Rule 29.4(c), to the Attorney General of New York, pursuant to 28 U.S.C. § 2403(b), that Petitioner is challenging the constitutionality of a New York State Statute, to wit; New York Executive Law § 63(3).

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